

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>JACK HURLEY</b>	:	DETERMINATION
	:	DTA NO. 815042
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1992	:	
through August 31, 1992.	:	

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Petitioner, Jack Hurley, 25 22nd Avenue, Isle of Palms, South Carolina 29451, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1992 through August 31, 1992.

On January 20, 1997 and February 12, 1997, respectively, petitioner, appearing pro se, and the Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel) consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were due to be submitted by June 20, 1997, which date commenced the six-month period for issuance of a determination in this matter. After due consideration of the record, Brian L. Friedman, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner was a person required to collect and pay over sales tax on behalf of Old Dock House, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) during the period at issue and is, therefore, liable for any such unpaid taxes owed by the corporation.

***FINDINGS OF FACT***

1. On March 16, 1995, the Division of Taxation ("Division") issued a Notice of Determination to Jack Hurley ("petitioner") which assessed sales tax in the amount of \$8,491.37, plus penalty and interest, for a total amount due of \$13,888.08 for the quarter ended August 31, 1992. The Notice of Determination explained that petitioner was an officer or

responsible person of Old Dock House, Inc. and, therefore, was liable for sales taxes determined to be due from the corporation.

2. Petitioner submitted an affidavit, sworn to on April 22, 1997, in which he states that from approximately 1986 through the summer and early fall of 1989, he was a shareholder, a director, an officer and an employee of the Old Dock House, Inc. with an active role in all phases of its operation, including taxes and finances.

3. According to the corporate resolutions, petitioner, as vice president, Jack Halpin, as president, and Robin Hill, as vice president, were authorized to sign corporate checks and drafts which were drawn on Champlain National Bank.<sup>1</sup> A letter from the Champlain National Bank to the Division's Tax Compliance Division, dated February 16, 1995, indicates that the Old Dock House, Inc. had two accounts at this bank. One account (Account No. 15 02207) was opened on May 8, 1986 and was closed February 22, 1988. Signatories for this account were: Jack Halpin, President; Jack Hurley, Treasurer; and Robin Hill, Vice President. The other account (Account No. 15 02012) was opened on May 30, 1986 and closed on July 15, 1993. Authorized signatories were: Jack Halpin, President; Jack Hurley, Vice President; Robin Hill, Vice President; and Norma Thomas, Bookkeeper.

4. On April 18, 1986, Ruth P. Cahill, as secretary-treasurer, filed a sales tax registration form on behalf of Old Dock House, Inc. On the form, in addition to Ms. Cahill's title, petitioner was listed as vice president and Jack Halpin as president. Petitioner's address, as set forth on the sales tax registration form was 42 Elmwood Avenue, Burlington, Vermont. On September 13, 1988, petitioner signed, as owner and manager, a form DTF-95, Change of Business Information, which was filed with the Division. The stated reason for filing the form was a change in the business's post office box number.

5. On August 22, 1988, the Division issued a Notice and Demand for Payment of Sales

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<sup>1</sup>As part of its exhibits, the Division submitted various corporate bank account information relating to the Old Dock House, Inc. The documents consisted of corporate resolutions, signature cards and requests for money market deposit accounts, all of which were dated between May 1986 and May 1988. Some of the documents were signed by petitioner; others listed him as a signatory in his capacity as vice president. On some of the documents, the name Norma M. Thomas appears, as bookkeeper, and illegible signatures of a secretary/treasurer are contained on some of these documents as well.

and Use Taxes Due to Old Dock House, Inc. for the quarter ended May 31, 1988. A letter in response to this notice was sent to the Division by petitioner.

6. The Division submitted the following corporate tax forms which were signed by petitioner: 1986 and 1987 forms CT-3, Corporation Franchise Tax Report; 1988 and 1989 forms CT-5, Application for Automatic Six-month Extension for Filing Tax Report or Return; and 1989 form CT-3-S, S Corporation Information Return.

7. The Division also submitted the corporation franchise tax returns (forms CT-4) filed on behalf of Old Dock House, Inc. for the years 1990 and 1991. Attached to the 1990 return was a schedule K-1 (Shareholder's Share of Income, Credits, Deductions, Etc.) issued to John Hurley<sup>2</sup> which indicated that petitioner was a 33-percent shareholder and had incurred an ordinary loss from the corporation in the amount of \$12,297.00. For 1991, the schedule K-1 stated that petitioner owned 26.8 percent of the stock and had incurred an ordinary loss of \$13,406.00 from the corporation for the year. On both of the schedules K-1, petitioner's address was listed as 175 Lyman Drive, Burlington, Vermont 05401.

8. As part of its exhibits in the present matter, the Division submitted the Federal returns filed by petitioner for the years 1992 and 1993. On each of these returns, petitioner indicated that his address was 25 22nd Avenue, Isle of Palms, South Carolina 29451. On the schedule E (Income or Loss from Partnerships and S-Corporations), petitioner reported, under the category of passive activities, loss from "The Old Dock Partnership" of \$3,097.00 and gain from "The Old Dock, Inc." in the amount of \$1,302.00.<sup>3</sup> On a note to schedule E attached to petitioner's 1993 Federal income tax return, it was stated that the Old Dock Partnership (ID# 14-1683867) had been sold, the K-1s had not yet been distributed and, as soon as the K-1s were received, the return would be amended.

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<sup>2</sup>On all of the bank signature cards, corporate resolutions and corporate returns signed by petitioner, his name appears as "Jack" Hurley; on the schedules K-1 and on his personal income tax returns, petitioner's name is listed as "John" Hurley.

<sup>3</sup>The employer identification number of the corporation was listed on its franchise tax reports and on petitioner's schedules E as 14-1679260. The identification number of The Old Dock Partnership is listed on the schedules E as 14-1683867.

9. Petitioner's affidavit states that in 1990, he had a "falling out" with the other owners and officers of the corporation (Robin Hill and Jack Halpin) concerning the operation of the business and thereupon "totally withdrew from every phase of the operation of the corporation, including the taxes and financial matters." He indicates that he then became a passive shareholder.

On July 10, 1991, petitioner states that he moved his wife and family to Isle of Palm, South Carolina and that he established a residence and business in that state. The affidavit does not indicate whether petitioner continued to own his home in Burlington, Vermont.

10. Petitioner's affidavit states that "upon information and belief, every phase of the business of the Old Dock House, Inc., was assumed entirely by Messrs Hill and Halpin during the summers of 1990 and 1991." It goes on to state that, again upon information and belief, Messrs. Hill and Halpin entered into a lease arrangement with a third party in 1992 and that it was this third party who generated the sales upon which the taxes at issue are allegedly due and owing. Petitioner maintains that since he was a passive shareholder, had no personal relationship with those operating the corporation and was located 875 miles from Essex, New York, he has no information as to precisely whom was involved in the operation of the business. He states, however, that he was not involved in or aware of the operation of the business.

11. During the period at issue (and after 1989), petitioner states that he was a minority shareholder who lacked any authority and control over the business, the disposition of its funds or the filing of its tax returns. After moving to South Carolina, he asserts that he had virtually no contact of any kind with the "active" shareholders. In 1993, he arranged to sell his shares in the corporation to the Halpins and his interest therein was actually conveyed to them in 1995.

Petitioner states that during the period at issue that he was not an employee, had no authority to hire and fire employees of the corporation, attended no shareholder or director meetings and "as far as I am aware, I had no authority to write corporate checks and I did not do so." His affidavit also alleges that he had nothing to do with the purchase of food or beverages for the restaurant and that he did not advance funds to the corporation or prepare, review or sign

tax returns on its behalf. He contends that he had no responsibility for nor did he ever maintain the corporate books and, furthermore, as far as he knew, he was not even an officer.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1133(a) provides that "every person required to collect any tax imposed by [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article." Tax Law § 1131(1) defines "persons required to collect tax" as "any officer, director or employee of a corporation . . . who as such officer, director [or] employee . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]."

In determining whether an individual is personally liable under these statutes, consideration must be given to the particular facts in each instance (20 NYCRR 526.11[b][2]; see, Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564, 565; Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862, 865; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). The fact that an individual was an officer of the corporation does not in itself make that individual personally liable (Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 537, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Vogel v. New York State Dept. of Taxation & Fin., supra; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427; Matter of Constantino, supra).

B. Factors to be considered, as set forth in the Division's regulations, include whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation. (20 NYCRR 526.11[b][2]). As summarized in Matter of Constantino (supra):

"[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (Cohen v. State Tax Commn., supra, 513 NYS2d at 565; Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 538, appeal dismissed 69 NY 2d 822, 513 NYS2d 1027; Vogel v. New York State Dept. of Taxation & Fin., supra, 413 NYS2d at 865; Chevlowe v. Koerner, supra,

407 NYS2d at 429; Matter of William D. Barton, [Tax Appeals Tribunal, July 20, 1989]; Matter of William F. Martin, [Tax Appeals Tribunal, July 20, 1989]; Matter of Autex Corp., [Tax Appeals Tribunal, November 23, 1988])."

C. In determining whether a person is a responsible officer, director or employee of a corporation and is, therefore, personally liable for the sales and use taxes owed by such corporation, it is imperative to examine not only the actual control which is exerted over the financial affairs of the corporation, but also whether the individual had a duty to act on its behalf. In other words, did that individual have, or could he have had sufficient authority and control over the corporation's affairs to be considered a responsible officer, director or employee?

In the present matter, petitioner admittedly was a shareholder, director, officer and employee of the Old Dock House, Inc. from 1986 through 1989. There is no evidence that at any time prior to the period at issue, he resigned from his position as an officer or director. There is substantial evidence that he signed tax returns on behalf of the corporation. In his affidavit, petitioner admits that he had an active role in all phases of the operations of the corporation, including taxes and finances. Somehow, because of an alleged falling out with other officers, petitioner asserts that he went from an extremely active role in the corporation to one of being solely a passive investor.

It has long been held that the failure of an officeholder, who is one of several officeholders, to exercise his or her share of the responsibility by leaving such duties for someone else to discharge, does not absolve the taxpayer from tax liability (Matter of Ragonesi v. State Tax Commn., 88 AD2d 707, 451 NYS2d 301; Matter of Baumvoll, Tax Appeals Tribunal, November 22, 1989; Matter of Roberto, Tax Appeals Tribunal, December 1, 1988). In Matter of Ledman (Tax Appeals Tribunal, October 5, 1995), a case which also involved a passive investor in a restaurant corporation, the Tribunal rejected that petitioner's contention that he was not responsible on the basis that there was no evidence that the authority of petitioner to act on behalf of the corporation changed in any way. Similarly, while petitioner, in the present matter, chose to move 875 miles away and to no longer play an active role in

corporate management, there is no evidence that he was prevented from exercising his authority. Petitioner's tax returns (along with the contents of his affidavit) substantiate that, during the period at issue, he remained a corporate shareholder. Despite his contentions that, as far as he knew, he was not even an officer during this period, there has been no evidence introduced which would indicate that he ever resigned his position as an officer (or director). Simply because there were others, i.e., Messrs. Hill and Halpin, who chose to play a more active role, does not absolve petitioner of his responsibility to collect and pay over sales tax on behalf of Old Dock House, Inc.

D. The petition of Jack Hurley is denied and the Notice of Determination issued on March 16, 1995 is hereby sustained.

DATED: Troy, New York  
December 4, 1997

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE